IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILIP J. SMYTHE, Petitioner,	:	
v.	:	CIVIL ACTION
WILLIAM F. WARD, Chairman, Commonwealth of Pennsylvania Board of Probation and Parole, PENNSYLVANIA BOARD OF PROBATION AND PAROLE, and D. MICHAEL FISHER, Attorney General of the Commonwealth of Pennsylvania Respondents.	:	NO. 00-0909

Memorandum and Order

YOHN, J. September ___, 2001

Philip J. Smythe has filed a habeas corpus petition brought pursuant to 28 U.S.C. § 2241. Smythe was convicted in 1991 and 1992 of four counts of aggravated indecent assault, indecent assault, and corruption of minors in the Court of Common Pleas of Bucks County, Pennsylvania. He was sentenced to imprisonment for an aggregate term of not less than five years, a period that expired on October 12, 1996, and not more than twenty years, which would run until October 12, 2011.

After having served his minimum sentence, Smythe became eligible for parole. On March 27, 1997, however, the Pennsylvania Board of Probation & Parole ("PBP&P") determined that given Smythe's status as a habitual offender, his pronounced assaultive behavior potential, his need for counseling and treatment, and his failure to benefit from a treatment program for sex offenders, parole could not be granted to him. Following this initial denial,

Smythe filed a state law mandamus action against the PBP&P and its members, seeking to compel his release from confinement. The Commonwealth Court of Pennsylvania dismissed the suit on the ground that because the decision whether to grant parole is discretionary, such was "not subject to mandamus in [the court's] original jurisdiction." *Smythe v. PBP&P*, No. 427-M.D.-1997 (Pa. Commw. Ct. May 9, 1997) (order dismissing petition). On August 27, 1997, Smythe filed a second complaint based on the parole denial. This action was civil in nature, and was brought in the Court of Common Pleas of Montgomery County, Pennsylvania against Chairman Ward and several other members of the PBP&P in their individual capacities. Smythe alleged that the denial deprived him of various rights secured by the Pennsylvania and federal constitutions, and sought money damages from the defendants in that suit pursuant to 42 U.S.C. § 1983. Subsequent parole denials were issued on May 27, 1998, January 15, 1999, September 27, 1999 and September 13, 2000, all of which cited Smythe's failure to successfully complete a treatment program for sex offenders.

On February 18, 2000, Smythe filed the instant pro se petition for a writ of habeas corpus based on the September 27, 1999 denial. Though it is less than perfectly clear from the face of the petition, it appears that he articulates two primary federal grounds for the relief sought. First, he asserts that the denial was effected in retaliation for the 1997 civil suit in Montgomery County against the individual board members, in contravention of his First Amendment right to free speech. *See Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000) ("We have recognized that '[t]he [constitutional] right of access to the courts . . . must be freely exercisable without hindrance or fear of retaliation.'" (quoting *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981))); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) ("The

reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right."). Second, he contends that the Pennsylvania Sentencing Code and due process require that prisoners be released at the expiration of their minimum term of incarceration.[1]

In their answer, respondents assert that the petition is not ripe for this court's review, as Smythe has failed to exhaust his state judicial remedies. In fact, he has not presented his claims regarding the most recent parole denial to any body other than this court. They also argue that the petition does not state a claim upon which habeas relief can be granted.

Discussion

As a general matter, federal courts will not entertain petitions for habeas corpus brought pursuant to 28 U.S.C. § 2241 unless all available state judicial remedies have been exhausted. *See Coady v. Vaughn*, 251 F.3d 480, 488 (3d Cir. 2001) ("While exhaustion is mandated by [28 U.S.C. § 2254(b)(1)(A)], it 'has developed through decisional law in applying principles of comity and federalism as to claims brought under 28 U.S.C. § 2241.'" (quoting *Schandelmeier v. Cunningham*, 819 F.2d 52, 53 (3d Cir. 1986))); *Callwood v. Enos*, 230 F.3d 627, 634 (3d Cir. 2000). Yet the failure to exhaust will not be fatal to a habeas petition where there are literally no state remedial procedures to be exhausted, or where although such

[1] I read the petition as arguing essentially that the PBP&P's denial of parole to an inmate after the conclusion of his minimum term of imprisonment is actually the imposition by a non-judicial body of an indefinite sentence upon him, in contravention of both 42 Pa. Cons. Stat. § 9721(e) (requiring that criminal sentences be for "a definite term"); and the requirement "that the 'sentencing judge' be the ultimate adjudicator of criminal sentences." *Commonwealth v. Knighton*, 415 A.2d 9, 12 (Pa. 1980) (citations omitted). Smythe appears also to assert that respondents' repeated failures to release him despite his having completed his minimum sentence have deprived him of a constitutionally protected liberty interest without due process of law. The conclusion generated by Smythe's reasoning is that the only way to avoid such violations is for all inmates to be paroled at the expiration of their minimum, judicially-imposed sentences.

procedures are available in the *de jure* sense, the *de facto* futility of their employment is overtly apparent. *See* 28 U.S.C. §§ 2254(b)(1)(B)(i) and (ii); *Castille v. Peoples*, 489 U.S. 346, 350 (1989) ("It would be inconsistent with [§ 2254(b)], as well as with underlying principles of comity, to mandate recourse to state collateral review whose results have effectively been predetermined . . . ."). Thus, given the nature of Smythe's claims, the pivotal question to be resolved initially by this tribunal is whether Pennsylvania law provides a prisoner with any procedural mechanism by which to challenge the constitutionality of parole denials.

This issue has received voluminous consideration in both the federal and Pennsylvania courts, and has been the source of much consternation. The first authoritative answer to the question in this circuit was rendered in *Burkett v. Love*, 89 F.3d 135, 142 (3d Cir. 1996). After a detailed examination of the law of Pennsylvania, the Court of Appeals concluded that there are "three potential ways of attacking the denial of parole in Pennsylvania courts–appeal, mandamus, or habeas corpus." *Id.*

Yet *Burkett* met with a generally negative reception in the Pennsylvania courts, which of course were not bound by its terms. *See, e.g., Weaver v. PBP&P*, 688 A.2d 766, 772 n.11 (Pa. Commw. Ct. 1997) ("[A]bsent a pronouncement by the United States Supreme Court, decisions of the inferior federal courts are not binding upon Pennsylvania courts."). Indeed, within just a few years following *Burkett*, it became indisputably clear that at least one, and possibly two, of the three avenues identified in that case as means of challenging parole denials are actually dead ends. A prisoner seeking to challenge a parole denial, regardless of the substantive basis for his claim, cannot do so through a direct appeal. *Rogers v. PBP&P*, 724 A.2d 319 (Pa. 1999).

Furthermore, it may be that such a challenge cannot be brought in a state law habeas corpus action either. *See Weaver*, 688 A.2d at 775 n.17. The unavailability of a state law habeas action could be implied from the holding of the Pennsylvania Supreme Court in *Coady v. Vaughn*, 770 A.2d 287, 289 (Pa. 2001). There, the Supreme Court held that "[a] proceeding in mandamus is an extraordinary action at common law, designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, *and want of any other adequate and appropriate remedy*." *Id.* (emphasis added). Thus, it seems that if habeas corpus were available to a prisoner raising constitutional challenges to a parole denial, the Pennsylvania Supreme Court would not have engaged in any substantive analysis of the availability of mandamus to Coady. *But see id.* at 290-94 (Castille, J., concurring) (espousing the view that habeas is in fact available to prisoners challenging parole denials on constitutional grounds).

Importantly, however, the Pennsylvania Supreme Court did not definitively indicate the unavailability of a state law habeas corpus action as a means of challenging the execution of a criminal sentence. Thus I am bound by the holding of the Third Circuit in *Burkett* that such an action is available. *See* 89 F.3d at 142. Yet I do not need to rely on this uncertain aspect of *Burkett* to conclude that Smythe must exhaust his state court remedies, as the Pennsylvania Supreme Court did squarely hold in *Coady* that mandamus is available to a prisoner seeking to mount a constitutional challenge to a parole denial. 770 A.2d at 290.

Indeed, the availability of Pennsylvania's mandamus procedure in these circumstances remained largely unclear until the decision of the Pennsylvania Supreme Court in *Coady*. That case originated in the United States District Court for the Eastern District of

Pennsylvania, and was appealed to the United States Court of Appeals for the Third Circuit. It presented the questions of whether Pennsylvania law provides a procedural remedy to a state prisoner seeking to challenge a parole denial on the ground that such violates the ex post facto clause of the United States Constitution, and if so, what that remedy is. The Court of Appeals found state law to be inconclusive on these points, and it certified the questions to the Pennsylvania Supreme Court for an authoritative resolution. That court granted the petition for certification, and held that Coady could assert his constitutional claim by way of a mandamus action. 770 A.2d at 290.

As applied to the instant matter, while not directly apposite the present facts, as the constitutional claim raised here is based in the right to free speech, not the right to avoid punishment as a consequence of an ex post facto law, *Coady* indicates strongly that Smythe too may bring a mandamus action in state court to raise this constitutional claim. At the very least, *Coady* makes it more likely than not that Smythe may do so, and this suffices to mandate exhaustion. As the Court of Appeals has recognized, "unless state law *clearly forecloses* state court review of claims which have not previously been presented to a state court," a prisoner must exhaust his state judicial remedies before a federal district court may assume jurisdiction over his petition for a writ of habeas corpus. *Lines v. Larkins*, 208 F.3d 153, 163 (3d Cir. 2000) (emphasis original). Under *Coady*, such simply is not the case.[2] Indeed, like that at issue in

[2] Moreover, upon the post-certification return of the case, the Third Circuit held in *Coady* that a state prisoner challenging the execution, as opposed to the validity, of his sentence (with a constitutional objection to a parole denial being precisely such challenge) must do so pursuant to 28 U.S.C. § 2254. 251 F.3d at 485. Thus, even if mandamus is not available to Smythe, I would be forced to dismiss this action under § 2241 without prejudice to his right to bring a habeas corpus petition under § 2254.

Coady, Smythe's is at the very least a "mixed petition," and consequently a dismissal for failure to exhaust is appropriate. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993).

For the sum of the foregoing reasons, I find that the law of Pennsylvania permits a prisoner to challenge the constitutionality of a parole denial by filing a mandamus action. Given the availability of this remedy, Smythe has failed to exhaust all of the available state judicial remedies as he is required to do. Accordingly, I will dismiss the petition without prejudice to Smythe's right to seek a writ of mandamus in the courts of Pennsylvania.

An appropriate order follows.

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Order

And now, this _____ day of September, 2001, upon consideration of the petition for habeas corpus (Doc. # 1), the respondents' answer (Doc. # 4), and petitioner's reply thereto (Doc. # 5), it is hereby ORDERED that the petition is DISMISSED WITHOUT PREJUDICE to Petitioner's right to raise his federal constitutional claims in a mandamus proceeding in Pennsylvania state court.

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William H. Yohn, Jr., Judge